LEE CHEUNG WING & ANOR.

v.

THE QUEEN

PRIVY COUNCIL
LORD BRIDGE OF HARWICH
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
[PRIVY COUNCIL APPEAL NO. 49 OF 1990]
29 APRIL 1991

CRIMINAL PROCEDURE: *Theft - Securities and futures - Rule against operation of margin accounts by employees - Falsification of withdrawal slips - Whether "gain" resulted - Purpose of falsification - Meaning of "view to gain" - Accountability of profits - Theft Ordinance [UK], ss. 8(2), 19(1)(a).*

The two appellants, L1 and L2 were employed as a securities dealer and a senior clerk in a commodities firm F, which prohibited its employees from operating margin accounts dealing in futures. However, L1 and L2 operated such an account through a friend C and traded actively in futures. When they wished to withdraw any profits, L2 would sign the withdrawal slips in C's name.

L1 and L2 were convicted of seven charges of false accounting contrary to s. 19(1)(a) of the Theft Ordinance and the appellants' appeal to the Court of Appeal was dismissed; hence this appeal.

The issue for determination was whether the admitted dishonest falsification of the withdrawal slips was with a view to gain. Counsel for the appellants contended that as the gain had already accrued upon the profitable futures contracts, the money was all along that of the appellants - in other words, no gain had resulted to the appellants and no loss had resulted to F as a result of the activities of the appellants.

Held:

[1] The purpose of falsifying the withdrawal slips was to enable the appellants to recover from their employer funds to which they were not entitled and which, but for the falsification, they could not have recovered. Therefore the withdrawal slips were falsified "with a view to gain".

[2] Any attempt by the appellants to recover those profits in their own names would almost certainly have been met by a plea of *ex turpi causa non oritur actio* which would have had the same result as the plea of accountability.

[Appeal dismissed.]

Case referred to:
Reading v. Attorney-General [1951] AC 507

Legislation referred to:
Theft Ordinance (Cap 210) [HK], ss. 8(2), 19(1)(a)

JUDGMENT

Lord Jauncey of Tullichettle:

This is an appeal from a judgment of the Court of Appeal of Hong Kong dismissing applications for leave to appeal against conviction in the District Court of seven charges of false accounting contrary to s. 19(1)(a) of the Theft Ordinance (Cap. 210).

The two appellants were formerly employed by Forex Commodities Limited (Forex) as a securities dealer and senior clerk respectively, the first appellant being the immediate superior of the second appellant. Forex offered facilities for customers to trade in Hang Seng Index Futures (HSIF) contracts on a margin basis which meant that they were required to lodge security for each contract. If the index moved up, the contract could be sold at a profit and if it moved down a loss would result. It was a rule of Forex, of which the appellants were aware, that employees were not allowed to operate HSIF margin accounts. With a view to circumventing this rule the second appellant persuaded a friend, Chung Kam Wah, to let him use Chung's name to open a HSIF account for the second appellant's benefit. Chung acceded to this request and provided the second appellant with a copy of his identity card. Thereafter the second appellant opened the account in the name of Chung signing the necessary forms with the latter's English name of Sammy and completing personal particulars which were also those of Chung's. At no time did Chung have any interest or concern with the account. Shortly thereafter the first appellant joined in the operation of the account and for nearly a year, until the stock market crash on 19 October 1987, both appellants used the account to trade extensively and on many occasions profitably in HSIF contracts. When the appellants wished to withdraw from the account the profits which they had made from transactions the second appellant signed a withdrawal slip for the appropriate amount in Chung's English name.

Details of the seven charges to which this appeal relates are set out in the following passage of the judgment of the Court of Appeal:

> The first charge relates to a transaction that took place on 15 April 1987. On that date the 2nd defendant at the request of the 1st defendant prepared a withdrawal slip in the sum of $22,000 on the account in the name of Chung. The 2nd defendant signed Chung's English name Sammy on the place where the customer was to sign and initialled the slip indicating that he had verified the validity of that signature. He then presented the slip to the chief cashier Mr. Ng who, relying upon the signature and the verification, approved that payment out of $22,000 in cash. The 2nd, 4th and 5th charges alleged that the same procedure was adopted. They are identical except for the dates and the amounts involved.
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> The 3rd, 6th and 7th charges are somewhat different. In those charges the withdrawal slips relate to cheque withdrawals. In each case the withdrawal slips were prepared by the 2nd defendant at the request of the 1st defendant. They were prepared in the name of Chung and in each case the 2nd defendant signed Chung's English name 'Sammy Chung' in the place reserved for the customer requesting the withdrawal, and the 1st defendant signed, allowing the withdrawal of the funds. The proceeds of those withdrawals were then paid out to the 2nd defendant.

Section 19 of the Theft Ordinance is in *inter alia* the following terms:

> (1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another:
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> (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose;

he shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for seven years.

A gain is defined in s. 8(2) of the Ordinance as follows:

(2) For the purposes of this Ordinance:

'gain' and 'loss' are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and:

(a) 'gain' includes a gain by keeping what one has, as well as a gain by getting what one has not; and

(b) 'loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has;

The only question in these appeals is whether the admitted dishonest falsification of the withdrawal slips was with a view to gain.

Mr. Bennett for the appellants strove valiantly to argue that no gain resulted to the appellants from the falsification of the slips. The gain had already accrued upon the profitable sale of futures' contracts, the money was all along that of the appellants' and accordingly no loss resulted to Forex from the appellants' activities. He conceded, however, that there would be difficulties in way of his argument if the appellants were unable to recover in their own name any profits which resulted from sales of futures' contracts.

Their Lordships are of the view that Mr. Bennet's ingenious argument is unsound. It is trite law that a servant who uses his position as employee to make a personal profit, is bound to account to his master for the profit, irrespective of whether the master has suffered any loss as a result of the servant's activities (*Reading v. Attorney General* [1951] AC 507, per Lord Porter at p. 516, Lord Normand at p. 517). There can be no doubt that the appellants were acting in concert in relation to the operation of the account and in particular the withdrawal slips. When the second appellant initialled four of the withdrawal slips in purported verification of the signature of Chung which he had previously forged he did so in his capacity as senior clerk. When the first appellant signed the other three withdrawal slips to allow funds to be withdrawn he did so as the second appellant's immediate superior. In these circumstances the profits which the appellants sought to recover by means of the seven withdrawal slips were profits for which they were in law bound to account to Forex. Thus if they had in their own names sought payment of those profits Forex would have been entitled to refuse the demand. In that situation it is crystal clear that the purpose of falsifying the withdrawal slips was to enable the appellants to recover from Forex the funds to which they were not entitled and which, but for the falsification, they could not have recovered. It follows that the withdrawal slips were falsified "with a view to gain" and that the appellants were rightly convicted of contravention of s. 19 of the Theft Ordinance.

Their Lordships would only add that, quite apart from any question of accountability for profits, any attempt by the appellants to recover those profits in their own name would almost certainly have been met by a plea of *ex turpi causa non oritur actio* which would have had the same result as the plea of accountability.

For the foregoing reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Also found at [1991] 2 CLJ 1455